Office-Supreme Court, U.S.
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No. 83-391

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CALIFORNIA GLAZED PRODUCTS, INC.,
a California Corporation,
Petitioner,

vs.

THE BURNS & RUSSELL COMPANY OF BALTIMORE CITY,
a Maryland Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

No question of law, either important or unimportant, is presented. Respondent licensed petitioner under a patent to make and sell a glazed brick. It also licensed petitioner to use, but did not require it to use, the trademark "Spectra-Glaze" on a glazed brick made from specified ingredients. Both courts below concurred in an obviously correct finding that there was no tie between the two licenses. The Court of Appeals held that, viewing the evidence in the light most favorable to petitioner, there was no evidence showing that the trademark license involved a tie between two separate products. The only questions are peculiar to this case alone, *viz.*, whether the Court of Appeals erred in its view of the facts, and whether both courts below erred in their joint finding on the meaning of the two licenses.

TABLE OF CONTENTS

	Page
Questions presented for review	i
Opinions below	1
Statement of the case	1
Discussion	2
Conclusion	4

TABLE OF AUTHORITIES CITED

Cases

Berenyi v. Immigration Director, 385 U.S. 630 (1967) 3

Ferro Concrete Const. Co. v. United States, 112 F.2d 488 (1 Cir. 1940), *cert. den.*, 311 U.S. 697 3

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) 3

Neely v. Eby Construction Co., 386 U.S. 317 (1967) 3

United States v. Johnston, 268 U.S. 220 (1925) 2

Venture Technology, Inc. v. Natural Fuel Gas Co., 685 F.2d 41 (2 Cir. 1982), *cert. den.*, ... U.S. ....., 74 L. Ed.2d 398, 103 S.Ct. 362 3

Rule

Supreme Court Rule, Rule 17 2

Other Authorities

65 American Bar Journal 1328 (Sept. 1979) 2

5A Moore's Federal Practice (2 Ed. 1982), p. 50-128 3

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 708 F.2d 1423 (1983) and appears as Appendix A to the petition. The District Court did not render an opinion.

STATEMENT OF THE CASE

Respondent adopts the accurate and succinct statement in the Opinion of the Court of Appeals.

DISCUSSION

Petitioner makes no effort to bring itself within this Court's Rule 17, i.e., to show that there are special and important reasons for granting the writ.

There was no dispute as to the applicable rule of law. Where a franchisor licenses a franchisee to conduct a separate business under a trademark or trade name, a requirement that the licensee buy goods from the franchisor *may* be an unlawful tie, for the name and the goods may be separate products. Where, however, the trademark is the name of a particular product, a requirement that the trademark can be used only on that product is not an unlawful tie because the product and its name are one.

The question in this case is a wholly factual one, peculiar to the evidence of this case: which of the two situations was present? The court below, speaking unanimously through Senior Circuit Judge Wisdom, sitting by designation, found an absence of evidence to support the first version. Petitioner's contention is that the Court of Appeals erred; but that simply asks this Court to substitute itself for the lower court on an evidence question, and the interests of the law are fully served by having one appellate court perform that function. This Court seeks to devote its efforts to cases which "involve principles, the application of which are of wide public importance or governmental interest. . ."* As Justice Holmes put it, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

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*E.g., letter of all the Justices to Senator De Concini, June 22, 1978, quoted in 65 American Bar Journal 1328 (Sept. 1979).

Petitioner claims that because the court below held that the trial court had erroneously denied respondent's motion for judgment notwithstanding the verdict, it violated petitioner's right to a jury trial and "departed from the usual course of judicial proceedings." Petition, p. 13. But the Courts of Appeal are empowered to review the denial of such a motion, and to order that judgment be entered in favor of the moving party, *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967), and they have routinely and repeatedly exercised that authority for decades. E.g., *Ferro Concrete Const. Co. v. United States,* 112 F.2d 488, 492 (1 Cir. 1940), *cert. den.*, 311 U.S. 697; *Venture Technology, Inc. v. Natural Fuel Gas Co.,* 685 F.2d 41, 48 (2 Cir. 1982), *cert. den.*, ... U.S. ....., 74 L.Ed.2d 398, 103 S.Ct. 362; 5A Moore's *Federal Practice* (2 Ed. 1982), p. 50-128, n. 11.

Petitioner makes a second contention, that the trademark license and the patent license were tied. The trial court found no tie between the trademark and the patent, and took that issue from the jury. Petitioner, after cross-appealing on two other issues, abandoned its appeal. Petitioner's "Main Brief" in the Court of Appeals, p. 4. The patent issue was therefore not even before the Court of Appeals in any proper way. It was nevertheless dealt with by that court in a footnote (708 F.2d at 1427, n. 11), in which the Court of Appeals concurred with the trial court's findings respecting the patent and trademark licenses. This Court ought not to be asked to construe ordinary commercial contracts, particularly in a case where the "two-court" rule is applicable. *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271, 275 (1949); *Berenyi v. Immigration Director,* 385 U.S. 630, 635 (1967).

Respondent refrains from dissecting petitioner's presentation of the evidence or from arraying the evidence that compelled the decision below. To do so would be to impose on this Court a task from which it should be spared.

CONCLUSION

Respondent respectfully submits that the petition should be denied.

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